



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

OFFICE OF REGIONAL COUNSEL, 17th FLOOR

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VIA FEDERAL EXPRESS

December 27 , 2004

John M. Scagnelli, Esq.
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
Lyndhurst, New Jersey 07071-0790

Dear Mr. Scagnelli:

Pursuant to our telephone conversation of October 22, 2004, the Office of Regional Counsel, including the Deputy Regional Counsel, has reconsidered the two specific legal issues that you raised during our August 12, 2004 meeting. These two issues were 1) whether, prior to completion of the ongoing Lower Passaic River Study ("Study"), your client, the Passaic Valley Sewerage Commissioners ("PVSC"), could receive a *de minimis* administrative settlement with the U.S. Environmental Protection Agency ("EPA") with regard to any CERCLA liability PVSC may have associated with the cleanup of the Lower Passaic River; and 2) whether, prior to completion of the Study, EPA could enter into a settlement with PVSC, on any basis, which would include a complete release for any such liability (i.e., a "global" settlement).

With regard to the *de minimis* issue, Section 122(g)(1)(A) of CERCLA provides that *de minimis* parties are those who contributed to a facility hazardous substances which are minimal, both in terms of volume and toxicity or other hazardous effects, relative to other hazardous substances at a site. EPA has a longstanding policy to enter into settlements with *de minimis* parties as early as possible in the Superfund response process. See EPA guidance documents entitled "Streamlined Approach for Settlements with *De Minimis* Waste Contributors under CERCLA Section 122(g)(1)(A)" (July 30, 1993), and "Methodology for Early *De Minimis* Waste Contributor Settlements under CERCLA Section 122(g)(1)(A)" (June 2, 1992).

After careful consideration of all information currently available to us concerning PVSC's releases to the Lower Passaic River, it is our view that it is unlikely that EPA could determine if PVSC would meet the statutory criteria for a *de minimis* party under CERCLA Section 122(g)(1)(A). For example, EPA has in its files evidence regarding releases of hazardous substances into the Lower Passaic River by PVSC. A report entitled, "Report Upon Overflow Analysis" issued by PVSC's own consultant, Killam Associates, states that from 1974 to 1975, 7.6 billion gallons of influent to the PVSC treatment plant was bypassed untreated to the Lower Passaic River. Other evidence shows that PVSC also bypassed untreated waste to the Lower Passaic River when the volume of flow in the system threatened to exceed capacity during rainstorms. Other releases have occurred through PVSC's "emergency" outfall approximately located at the confluence of the Passaic River and Newark Bay, including but not limited to, a nine hour discharge of raw, untreated waste in 1977 and a six month discharge of treated sewerage in 1980. The 1980 discharge resulted in an Administrative Order being issued by the New Jersey Department of Environmental Protection finding that PVSC was violating water quality criteria for Newark Bay. As you may know, since the Lower Passaic River is tidal, any release at PVSC's "emergency" outfall will affect the Lower Passaic River. Even if PVSC were to meet the high threshold of *de minimis* status, the uncertainty associated with the Study Area at this time would likely require a prohibitively large premium. Among the goals of the ongoing Study is to gather information which will facilitate the determination of the relative shares of each party.

In addressing your second question – whether EPA would consider a settlement with PVSC which would provide a complete release from any future liability for cleanup activities at the Lower Passaic River – we have also carefully considered your position with regard to the potential liability of PVSC pursuant to CERCLA. Based upon this review, we believe that application of the statutory liability provisions of CERCLA to the facts of PVSC's involvement at the facility would result in PVSC being found liable under the statute. Such liability could stem from CERCLA Section 107(a)(1) and (2), pursuant to which, PVSC could be found to be a past or present owner or operator at the time of disposal of hazardous substances through each regulator (which PVSC admits to owning and operating). Further, under CERCLA Section 107(a)(3), PVSC could be held to be an arranger by contract with industrial or other users. Finally, under CERCLA Section 107(a)(4), PVSC could be held to be a transporter since it accepts and accepted hazardous substances from industrial and other users for transport to disposal or treatment facilities and, through the regulator, selected whether the hazardous substances would go to the treatment facility or to the Lower Passaic River.

In our meeting on August 12, 2004, we engaged in a discussion of the current case law that applies to PVSC's situation. EPA has evaluated your interpretation of the case law, and we remain unpersuaded that your position would be upheld in court. Nevertheless, to date, EPA has exercised its enforcement discretion and has not issued PVSC a Notice Letter.

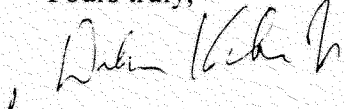
Given the likelihood that PVSC would be held liable for CERCLA cleanup activities at the Lower Passaic River, and also given the lack of information necessary to determine the nature and scope of any remedial actions that might be determined to be necessary for the Lower Passaic River, a "global" settlement at this time would face many of the same uncertainties described above in our discussion of a possible *de minimis* settlement. We note, however, that as set forth in the draft Administrative Order on Consent ("AOC") that was sent to you on August 26, 2004, EPA has offered

to include a provision in the AOC indicating EPA's willingness to give PVSC credit for actions to be taken by PVSC with respect to the combined sewer outflows that may ultimately be selected as part of the remedy for the Study Area. Although inclusion of such a provision would not at this time eliminate liability for any remedial action that is undertaken after the Study is completed, it would allow PVSC to implement its system improvements in the interim knowing that any potential future settlement between PVSC and EPA would contain a credit for those improvements thus reducing any allocable share PVSC might have to pay pursuant to CERCLA.

I urge you to recommend that PVSC seriously consider the AOC that EPA sent to you in draft form in August. We will be pleased to consider any written comments PVSC may have concerning the draft AOC and would be happy to meet with PVSC following receipt of such comments. In order to keep this matter moving forward, I would appreciate it if you could please respond to me with any comments by January 31, 2005. If you have any questions concerning this, please feel free to contact me at 212-637-3141.

Thank you for your attention to this matter.

Yours truly,


for Amelia M. Wagner
Assistant Regional Counsel

cc: Eric Schaaf, Deputy Regional Counsel
Raymond Basso, Acting Deputy Director, ERRD